IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.776/2001

Suraj Mal @ Surjya S/o Shri Phool Chand
...Accused-Appellant
Versus

State of Rajasthan through Public Prosecutor
...Respondent

Date of Judgment ::: March 8,2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri R.L. Agrawal with
Shri S.C. Mittal for the accused-appellant
Shri B.S. Chhaba, P.P., for the State

By the Court:-

This appeal, on behalf of the accused Suraj Mal @ Surjya S/o Shri Phool Chand, is directed against the judgment and order dated 19.7.2001 passed by the Special Judge, N.D.P.S. Cases, Jhalawar, in Sessions Case No.29/2000, whereby he convicted the accused-appellant for the offence under Section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act') and sentenced him to 10 years rigorous imprisonment and a fine of Rs.1,00,000/-; in default of payment of fine, to further undergo one year's additional rigorous imprisonment.

Briefly stated the facts relevant for disposal of this appeal are that PW-8 Pradeep Kumar, S.H.O., Police Station, Bhawanimandi, received a secret information on 11th August 2000 at about 11.00 P.M. on telephone from one informer that there is a house of Surajmal Meena at Mandvi Road, Tagar Mohallah, Bhawanimandi and he has smack in his possession and he will go to Kota in night by 'Janta Express' to dispose of the contraband. The said information was reduced by him in writing vide Exhibit P-13 and the information was sent to Superintendent of Police, Additional Superintendent of Police, Jhalawar and Circle Officer, Bhawanimandi, through wireless (Exhibit P-14). Thereafter he proceeded from the police station at 11.20 P.M. with Yashwant Singh, S.I., Dadam Chand, Ghanshyam and Ramesh Chand, Constable, with investigation kit. He reached at the residential house of Surajmal as per information of informer. Thereafter he directed the constable Dadam Chand vide written order (Exhibit P-9) dated 11.8.2000 at 11.30 P.M., to bring two local inhabitants as independent witnesses to attend and witness the search. However, PW-4 Dadam Chand gave his report at 11.45 P.M. that no one is available because of night and all persons are sleeping

in their houses. He knocked the doors of many houses but no one opened the door. Thereafter PW-8 Pradeep Kumar directed Yashwant Singh, S.I., and Ramesh Chand, Constable, to witness the search. They knocked the door of house of Surajmal. One person came out of house, who, on asking, disclosed his name as Surajmal. He was told by them that they have information about possession of contraband by him in his house, therefore, they would like to search the house. The house was searched and from one trouser of the accused the contraband smack weighing 55 gram was recovered. Two samples of five gram each were taken and sealed in polythene bags. The recovery memo (Exhibit P-10) was prepared by PW-8 Pradeep Kumar, S.H.O., Bhawanimandi, and accused was arrested. Thereafter the case was handed over for investigation to PW-2 Madan Lal, S.H.O., Police Station Mishroli, District Jhalawar, who, after investigation of the case, submitted a charge-sheet against the accused for the offence under Section 8/21 of the Act.

The trial court framed charge against the accused for the offence under Section 8/21 of the Act. The accused denied the charge and claimed to be tried. The prosecution examined eight witnesses and produced

documentary evidence Exhibit P-1 to Exhibit P-21. Thereafter the statement of accused was recorded under Section 313 Cr.P.C. wherein he stated that he is not concerned with the trouser and the house from where the contraband has been recovered. He stated that no recovery of contraband was made from his possession. He also stated that he was called at police station and his signatures were obtained there. He has been falsely implicated in the case at the instance of his enemies. He also stated that he was not given any option. No evidence was adduced in defence. The learned trial court, after hearing both the parties, convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the accused-appellant contended that PW-8 Pradeep Kumar did not obtain any warrant of search from the Magistrate in the present case nor he recorded any reasons, as required by proviso to sub-section (1) of Section 42 of the Act, that he has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender. It was further contended that although the search should have been conducted after obtaining the warrant for search from a

Magistrate but if the officer had reason to believe that obtaining of warrant is not possible then it was necessary for him to record the reasons of his belief as it was a case of search between sunset and sunrise.

He also contended that from Exhibit P-9 it is clear that independent witnesses were not called in the present case. PW-8 Pradeep Kumar directed PW-4 Dadam Chand to bring two local inhabitants to attend and witness the search and seizure. PW-4 did not make any effort and reported that he knocked the doors of many houses but no one opened the doors as it was night. Thereafter no further efforts were made by PW-8 Pradeep Kumar to call two independent and respectable inhabitants of the locality concerned to attend and witness the search and seizure. He contended that in absence of independent witnesses the case of the accused has been prejudiced.

The learned counsel for the accused-appellant also contended that the seal used in sealing the sample was not forwarded to Forensic Science Laboratory (for short, 'FSL') and it has prejudiced the case of the accused for the reasons that there is variance in the weigh of the sample received by the FSL. The sample weighing 5 gram was sealed vide recovery memo (Exhibit

P-10) whereas FSL Report (Exhibit P-21) shows that the sample was weighing 5.190 grams. He further contended that in the recovery memo there is a reference that the contraband was of light brown colour whereas FSL report shows that contraband was of dark brown colour.

The learned counsel for the accused-appellant further contended that the prosecution failed to prove the exclusive possession of the accused of the house and no documentary evidence showing his ownership of the house has been produced on the record. He also contended that the case property was not produced in the case so as to identify the same by the prosecution witnesses. He, therefore, contended that in view of the above submissions it is clear that the prosecution has failed to prove the case against accused-appellant beyond all reasonable doubts and he is entitled to get the benefit of doubt.

The learned Public Prosecutor contended that the learned trial court has considered the oral and documentary evidence and has rightly convicted and sentenced the accused-appellant, therefore, no interference is required to be made in the impugned judgment of the trial court and the appeal of the accused-appellant be dismissed.

I have considered the rival submissions and minutely scanned the impugned judgment as well as the record of the trial court.

In State of Punjab Vs. Balbir Singh, AIR 1994 SC 1872, the provisions of Sections 41 and 42 of the Act were considered and held to be mandatory in nature. The Hon'ble Supreme Court observed that the object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to S.42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

The Hon'ble Supreme Court, in the above case, further observed that under Section 42(2) such empowered officer who takes down any information in

writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory.

The Hon'ble Supreme Court in Mohinder Kumar Vs. The State, Panaji, Goa, AIR 1995 SC 1157, held that the provisions of Sections 42 and 50 dealing with steps to be taken by officer making arrest, search or seizure, are mandatory and if these provisions are not complied with then accused would be entitled to be acquitted.

The three Judges Bench of the Hon'ble Supreme Court, in Chhunna alias Mehtab Vs. State of M.P., (2002) 9 SCC 363, again observed that if there has been a non-compliance with the provisions of the proviso to Section 42, the trial stands vitiated.

In the light of above proposition of law, I consider the evidence of the present case in the context of Section 42 of the Act. PW-8 Pradeep Kumar received a secret information from the informer and the same was reduced in writing i.e. Exhibit P-13 and the same was forwarded to the superior officers vide Exhibit P-14. However, no warrant of search was

obtained from the Magistrate under Section 41 of the Act. PW-8 Pradeep Kumar was holding the post of S.H.O. of police Station and was competent to proceed for search and seizure even without warrant of search and authorisation, but before doing so, it was obligatory on his part to record the reasons thereof, as required by proviso to sub-section (1) of Section 42 of the Act. PW-8 Pradeep Kumar, in his cross-examination, has admitted that it is correct that he did not prepare any memo recording reasons for not obtaining search warrant and the same was not sent to superior officer. His admission of above fact in his statement before the trial court is reproduced as under:-

> “YAHA SAHI HAI KI SEARCH WARRANT NAHI PRAPT KARNE KE KAARNO KA ULLEKH KARTE HUYEN KOI PRAPATRA TAYAAR NAHI KIYA NAA UCHCHAADHIKARION KO BHEJA.”

Therefore, there is a clearcut admission of the searching and recovery officer PW-8 Pradeep Kumar that he did not obtain any search warrant from the Magistrate nor he prepared any memo recording any reasons for not obtaining the same and as such he did not send such memo of reasons to his superior officer. Thus, in view of his statement, it is clear that there is a total non-compliance of mandatory provisions of

proviso to sub-section (1) of Section 42 of the Act in the present case and in view of the law laid down by the Hon'ble Supreme Court, as discussed above, the accused-appellant is entitled to get the benefit of it. The Hon'ble Supreme Court, while considering the object of the Act has observed that to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which, in the context, have to be observed strictly.

In view of the above discussion, I am satisfied that there is a total non-compliance of mandatory provisions of proviso to sub-section (1) of Section 42 of the Act, in the present case, which is mandatory in nature and the accused-appellant is entitled to be acquitted only on this ground alone. Therefore, I do not intend to discuss the other submissions of the learned counsel for the accused-appellant.

Consequently, the appeal is allowed. The impugned judgment is set aside. The accused-appellant is acquitted. He is in jail, therefore, he may be released forthwith, if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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